IN THE COURT OF APPEALS OF IOWA

No. 0-435 / 09-1796
Filed August 25, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SIMEON SHANE MIHOCES,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell G. McGhee, District Associate Judge.

Defendant appeals from his conviction for operating while intoxicated contending the court erred in denying his motion to dismiss. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, John P. Sarcone, County Attorney, and David Porter, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J. takes no part.

SACKETT, C.J.

Defendant, Simeon Shane Mihoces, appeals from his conviction for operating while intoxicated in violation of Iowa Code section 321J.2(1)(c) (2009). He contends the court erred in denying his motion to dismiss because the State violated his right to a speedy indictment. We affirm.

I. BACKGROUND AND PROCEEDINGS. On March 13, 2009, Des Moines police officer, Michael Dixson, observed Mihoces driving without a seatbelt, without a front license plate, and with a broken brake light. Dixson conducted a traffic stop and noted Mihoces had watery eyes and "thick" speech. He believed he also smelled alcohol. Mihoces consented to a search of his car and to perform field sobriety tests. Dixson discovered a tin with crystals resembling methamphetamine in the car. A preliminary breath test showed no presence of alcohol in Mihoces's system. Mihoces failed the field sobriety tests. He was handcuffed and taken to the police station. The officer invoked implied consent under Iowa Code section 321J.6(1)(f) finding Mihoces had a preliminary breath test with an alcohol concentration of less than 0.08 but reasonable grounds existed to believe that Mihoces was under the influence of another drug. Mihoces gave a urine sample. He was issued citations for the traffic violations and released. Approximately two hours passed between the time of the traffic stop and his release.

On April 13, 2009, a preliminary lab report confirmed the urine tested positive for drugs. It stated "[a] positive screen indicates the possible presence of a substance" and "[r]eport(s) on positive screens to confirm the presence of

specific drugs or metabolites will follow." On May 10, 2009, a preliminary complaint was filed alleging Mihoces operated a vehicle while intoxicated. On May 28, 2009, the criminalistic lab issued a final report stating that the urine positively contained amphetamine and methamphetamine. On June 10, 2009, the district court determined there was probable cause to arrest the defendant for OWI and issued an arrest warrant. Mihoces was indicted when the State filed the trial information on July 24, 2009, formally charging him with OWI.

Mihoces, through counsel, moved to have the charge dismissed contending he was not indicted within forty-five days of his arrest, in violation of his right to speedy indictment guaranteed by Iowa Rule of Criminal Procedure 2.33(2)(*a*). The district court overruled the motion. Mihoces stipulated to a trial on the minutes of evidence and was found guilty. He appeals alleging the court erred in denying his motion to dismiss.

II. APPLICABLE LAW. Our review of a court's interpretation and application of the speedy indictment rule is for correction of errors at law. *State v. Lies*, 566 N.W.2d 507, 508 (Iowa 1997); *State v. Edwards*, 571 N.W.2d 497, 499 (Iowa Ct. App. 1997).

> When an adult is arrested for the commission of a public offense . . . and an indictment is not found against the defendant within 45 days, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown or the defendant waives the defendant's right thereto.

Iowa R. Crim. P. 2.33(2)(*a*). The time period begins to run at the date a person is taken into custody or "arrested." *See State v. Lasage*, 523 N.W.2d 617, 620 (Iowa Ct. App. 1994) ("When a person is taken into custody, he or she is arrested

for purposes of [the speedy indictment rule.]"). The time period ends at the date of the indictment, or in this case, the date the trial information was filed. *See* Iowa R. Crim. P. 2.5; *State v. Davis*, 525 N.W.2d 837, 839 (Iowa 1994) ("The term 'indictment' embraces a trial information for the purposes of [rule 2.33(2)(*a*)].").

"Arrest" for purposes of rule 2.33(2)(*a*) means, "the taking of a person into custody when and in the manner authorized by law, including restraint of the person or the person's submission to custody." Iowa Code § 804.5; *State v. Rains*, 574 N.W.2d 904, 910 (Iowa 1998). When making an arrest, an officer generally must inform the person of his intent to make the arrest, the reason for the arrest, and require the person to submit to custody. Iowa Code § 804.14; *State v. Johnson-Hugi*, 484 N.W.2d 599, 600 (Iowa 1992). But formal words of arrest are not required. *State v. Dennison*, 571 N.W.2d 492, 495 (Iowa 1997) (citing *State v. Harvey*, 242 N.W.2d 330, 339 (Iowa 1976)). There is no bright-line test and no single factor is determinative, but courts have considered whether the officer had a purpose to arrest the person, whether the individual was booked on any charges, and whether the person was handcuffed. *See id.* at 494-95. In addition, if a person is taken into custody but it is thereafter decided that no charges will be filed and the individual is unconditionally released, the speedy indictment clock is tolled. *Lasage*, 523 N.W.2d at 620.

III. MERITS. Mihoces contends the speedy indictment rule was violated because he was arrested on the date he was initially stopped, March 13, 2009, and he was not indicted until 139 days later when the information was filed on

July 24, 2009. The State contends Mihoces was not arrested for the OWI charge until July 11, 2009, when Mihoces made an initial appearance on the OWI charge after the arrest warrant was issued. If this was the date of the arrest, the State's trial information was filed thirteen days later, within the forty-five day period. The State claims Mihoces was only detained on March 13, 2009, for the limited purpose of conducting further tests to investigate whether Mihoces was operating a vehicle while intoxicated.

In *State v. Dennison*, 571 N.W.2d 492 (Iowa 1997), the court considered whether the speedy indictment rule was violated in circumstances similar to those before us. An officer approached Dennison while he was driving in a parking lot. *Dennison*, 571 N.W.2d at 493. The officer knew Dennison did not have a valid license and when the officer approached the car, he smelled alcohol and marijuana. *Id.* He informed Dennison he was being arrested for driving with a revoked license and open container. *Id.* He was read his *Miranda* rights, handcuffed, and taken to the jail. *Id.* He was then taken to a room where another officer invoked implied consent and obtained a urine sample from him. *Id.* He was then booked on the charges for driving while revoked and open container and released. *Id.* Over two months later the officer received the toxicology report results showing Dennison had marijuana in his system. *Id.* A complaint was then filed charging Dennison with OWI, he was arrested, and the State filed a trial information. *Id.* at 493-94.

Dennison sought to have the charge dismissed claiming he was arrested for OWI on the date of the initial stop and the trial information was filed beyond

the forty-five day period. *Id.* at 494. The court distinguished situations where one is in custody for the purpose of arrest and when one is detained for investigative purposes only. *See id.* at 495. It also stated that an officer does not have to perform an arrest prior to invoking implied consent in some situations. *Id.* An officer may request a blood or urine sample if "the officer has reasonable grounds to believe an individual may be under the influence of a drug other than alcohol or a combination of alcohol and another drug." Iowa Code § 321J.6(1)(f); *Dennison*, 571 N.W.2d at 495. An individual may be detained temporarily and transported to a facility for this purpose without being placed under arrest. *Dennison*, 571 N.W.2d at 496. The court determined Dennison was merely detained for the purpose of investigation of an OWI charge because "the officer had reasonable grounds to believe Dennison was under the influence of a drug other than alcohol or a combination of alcohol and another drug." *Id.* at 495. The court found it significant that the test results were not received by the police within the forty-five day period, that the result was necessary to either prove the charge or provide exculpatory evidence for the defense, and that on the date of the initial stop, the officers did not issue a citation or complaint charging Dennison with OWI. *Id.* at 497.

Mihoces argues his case is more like *State v. Davis*, 525 N.W.2d 837 (Iowa 1994). In that case the State conceded they arrested Davis on the date of the initial stop. *Davis*, 525 N.W.2d at 839. He was given *Miranda* rights, handcuffed, searched, and taken to the county jail where implied consent was invoked. *Id.* at 838. He was taken to a hospital for a blood specimen, and

returned to the jail where an officer and Davis completed a written citation and complaint for the OWI charge. *Id.* He was then booked but released after a superior officer decided additional paperwork should not be completed until blood test results were received. *Id.* The blood test results were received four days after the initial arrest but a complaint was not filed for three weeks. *Id.* The trial information was not filed within forty-five days of the initial arrest. The State argued that, even though Davis was arrested on the date of the initial stop, the speedy indictment period should not have started until the complaint was filed after the blood test results were received. *Id.* at 839. The court rejected this position, finding that the test results were received within the forty-five day period but the State continued to wait on the matter and allowed the speedy indictment period to expire. *Id.* at 840. It affirmed the district court's dismissal of the charge due to the speedy indictment violation. *Id.* at 841.

We agree with the State that the *Dennison* case applies to the facts before us. The initial investigation reports the crime as OWI but specifies it is pending. It lists additional charges of possession of drug paraphernalia, failure to wear a seatbelt, and failure to have proof of insurance. On the implied consent request form, the officer marked as grounds for the request that he had a reasonable belief that Mihoces was under the influence of a drug other than alcohol. He did not mark the option of obtaining a specimen on the ground that Mihoces was placed under arrest for OWI. The preliminary drug test result was received within forty-five days of the initial detention but the final report was not received until May 28, 2009, nearly ten weeks after the initial detention. The State did not wait

on the charge after receiving the final drug results. It filed a formal complaint and obtained an arrest warrant on June 10. There is no indication that a citation or complaint form was completed alleging the OWI charge until the final drug test results were received. We agree Mihoces was initially detained for the limited purpose of conducting the tests to investigate whether he was under the influence of drugs, and this did not constitute an arrest. *See Dennison*, 571 N.W.2d at 497. Mihoces was not officially arrested until he made an initial appearance on the charge on July 11, 2009. The trial information was filed on July 24, 2009, within the speedy indictment time requirement. The district court did not err in refusing to dismiss the charge against Mihoces and we affirm his conviction.

AFFIRMED.